Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

General Notice

FUEL OIL BLENDING—CREATION OF A NEW AND DIFFERENT PRODUCT FOR THE PURPOSES OF THE COASTWISE LAWS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed change of position; solicitation of comments.

SUMMARY: The U.S. Customs Service is reviewing its current position on fuel oil blending operations as they relate to the coastwise laws. The current position is that a fuel oil blending operation which changes the original product in sulfur content, specific gravity, pour point, and viscosity creates a new and different product. Customs now believes that this policy may not be correct for all such blending operations. Whether a new and different product is created by such operations is significant because foreign-flag ships are prohibited from transporting merchandise (including oil) between ports in the U.S. under existing law unless prior to delivering the cargo to its U.S. port of destination it has been transformed into a new and different product from that which was laden in a U.S. port. Because this possible change of position could have an impact on certain members or the public, this notice invites public comments on the subject.

DATE: Comments must be received on or before January 2, 1990.

ADDRESS: Comments (preferably in triplicate) may be addressed to, and inspected at, the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Carrier Rulings Branch, 202–566–5706.

SUPPLEMENTARY INFORMATION:

Background

The Customs Service is reviewing its current position that a fuel oil blending operation which changes the original product in sulphur content, specific gravity, pour point, and viscosity generally creates a new and different product within the meaning of § 4.80b(a), Customs Regulations (19 CFR 4.80b(a)).

Whether a new product is created or not is particularly significant because of the implications associated with transportation of the product. Title 46, United States Code Appendix, section 883 (46 U.S.C. App. 883), commonly called the Jones Act, provides, in part, that no merchandise shall be transported between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by citizens of the United States.

The case of *American Maritime Association* v. *Blumenthal*, 590 F. 2d 1156 (1978), involved the applicability of 46 U.S.C. App. 883 to the transportation of crude oil by a foreign-flag tanker from Valdez, Alaska, to the U.S. Virgin Islands, and the subsequent transfer of products refined from that oil from the Virgin Islands to the continental United States. The refining process turned the Alaska crude oil into eleven different products, each different in name, physical and chemical character, and use, both from each other and from the crude oil. Because of these processes, it was determined that refining created new and different products from the Alaskan crude, and therefore their transportation by foreign-flag vessels from the Virgin Islands to the United States did not violate § 883.

Section 4.80b was added to the Customs Regulations in 1979 in order to enunciate the Customs position that merchandise must undergo some manufacturing or processing at an offshore port or place which results in a new or different product to be exempt from the restrictions of the coastwise laws.

Historically, in determining whether a new or different product has occurred as the result of a particular fuel oil blending operation, Customs has looked to whether the resultant product differed from the original products in four characteristics: sulphur content, specific gravity, pour point, and viscosity. Additionally, Customs has held that merchandise manufactured or processed into a new and different product must be landed and processed at an intermediate port or place other than a coastwise point. The manufacturing or processing may not take place on board a vessel.

Customs has reviewed its current treatment of the oil blending process, and now is of the position that without specific data concerning the process and materials used, it is not possible to determine whether a new and different product has been manufactured or processed within the meaning of § 4.80b(a), Customs Regulations,

as a result of blending of fuel oil. Customs believes that the process of refining whereby the actual chemical structure of the original product is altered creates a new and different product. Although blending changes some characteristics (i.e., sulphur content, specific gravity, pour point, and viscosity), these changes would have to be of significant proportions for a new and different product to be created within the meaning of § 4.80b(a), Customs Regulations.

Customs has suspended all rulings on this matter until the issue has been finally resolved. It is Customs view that, prior to reaching future determinations that a new and different product has in fact been created by a blending operation for purposes of § 4.80b(a), the procedures and specific data of such operations should be submitted by the party seeking such a determination. Customs will then review the data and make the necessary determination, which will form the basis for a decision regarding any possible violation of the coastwise laws.

AUTHORITY

Because a change of position, if implemented, will result in some operational changes in affected business entities, Customs is giving interested parties notice and an opportunity to comment in accordance with § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)).

REQUEST FOR COMMENTS

Accordingly, Customs is requesting interested parties to submit comments on the extent to which the blending of fuel oil is necessary in order to create a new and different product within the meaning of § 4.80b(a), or whether some degree of refining is necessary to create such a product.

Before making a final determination in this matter, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 1.6, Treasury Department Regulations (31 CFR 1.6), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW. Room 2119, Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: October 25, 1989.
SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 1, 1989 (54 FR 46075)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89–142)

MEN'S WEAR INTERNATIONAL, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court Nos. 83–01–00085, and as per schedule.

A scheduling order is entered pursuant to Rule 16(b) of the Rules of this Court to dispose of actions remaining on the suspension disposition calendar established after the decision in the test case *Izod Outerwear, Div. of Gen. Mills, Inc.* v. *United States,* 9 CIT 309 (1985). Parties must either dispose of these actions prior to the scheduled expiration of the suspension disposition calendar or have the actions moved to a trial calendar.

[Scheduling order entered.]

(Decided October 13, 1989)

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* On July 23, 1985, this court decided *Izod Outerwear, Div. of Gen. Mills, Inc.* v. *United States,* 9 CIT 309 (1985). Following designation of *Izod* as a test case pursuant to Rule 84(b) of the Rules of this Court, a suspension calendar containing 387 related actions was established pursuant to Rule 84(a) of the Rules of this Court.

When the *Izod* decision became final, a suspension disposition calendar was established pursuant to Rule 85(a) of the Rules of this Court, containing all 387 actions from the suspension calendar. Thereafter, the Court directed the Clerk of the Court to issue the notice required by Rule 85(b) of the Rules of this Court advising the parties that the 387 actions would remain on the suspension disposition calendar for 18 months, the maximum time allowed under Rule 85(b) of the Rules of this Court.

A review of the history of the suspension disposition calendar shows that this Court has generously granted each action an average of five motions for an extension of time to remain on the suspension disposition calendar pending settlement by the parties. Currently, 184 actions remain on the calendar.

Federal trial courts have a responsibility to manage their dockets to provide for the efficient and expeditious termination of controversies. *Applied Research Labs.* v. *United States,* 70 Cust. Ct. 321, 323 (1973). One tool by which this Court may manage its docket is the *sua sponte* dismissal of actions which are languishing without further prosecution. *Link* v. *Wabash R.R. Co.,* 370 U.S. 626–30 *reh'g denied* 371 U.S. 873 (1962); *Julien* v. *Zeringue,* 864 F.2d 1572, 1575 (1989); *United States* v. *Chas. Kurz Co.,* 55 CCPA 107, 110, C.A.D. 941, 396 F.2d 1013, 1016 (1968). *See also* Rule 41(b)(2) of the Rules of this Court. In *Chas. Kurz Co.,* the predecessor to our Court of Appeals stated that "[e]very court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution." *Id.* at 110, 396 F.2d 1016 (*quoting Sweeny* v. *Anderson,* 129 F.2d 756, 758 (10th Cir. 1942)). *See also Thermocycle Int'l* v. *A.F. Hinrichsen Sales Corp.,* 851 F.2d 339, 341 (Fed. Cir. 1988).

While these actions do not warrant dismissal, in order to expedite the resolution of these controversies and in the sound exercise of its discretion pursuant to Rule 16(b) of the Rules of this Court, the Court issues the following scheduling order:

1. The parties are to complete all discovery in these actions by the dismissal date stated in the attached schedule;
2. Any proposed stipulated judgment on agreed statement of facts under Rule 58.1 of the Rules of this Court must be submitted to the Government with the required notice to the Court and any dispositive motions are to be filed with the Court before the close of business fifteen days after the dismissal date stated in the attached schedule;
3. Before the close of business on the date 30 days following the deadline set in paragraph two of this order, the government must file with the Court either a stipulated judgment or a notice of the rejection of a proposed stipulated judgment or a response to a dispositive motion; and
4. Any actions remaining on the Suspension Disposition Calendar on the first business day following the deadline stated in paragraph 3 of this order will be moved to an active trial calendar for disposition.

The Court will entertain no further motions for an extension of time or other removal procedures under rule 85(c) of the Rules of this Court.

The Court finds that the procedures established in this Opinion and Order will expedite the resolution of these actions. The Court further finds that the procedures established herein are consistent with Rules 16 and 85(d) of the Rules of this Court and the parties' constitutionally protected rights of due process. *Intercontinental Fibers, Inc.* v. *United States,* 2 CIT 133 (1981); *Applied Research Labs.* v. *United States,* 70 Cust. Ct. 321, C.R.D. 73–2 (1973).

SUSPENSION DISPO

COURT NUMBER	PLAINTIFF	A
83-01-00085	Men's Wear International Inc.	Barnes, Ric 475 Park A New York,
83-02-00204	Men's Wear International Inc.	Barnes, Ric 475 Park A New York,
83-02-00280	Starlight Trading Inc.	Barnes, Ric 475 Park A New York,
83-04-00529	Men's Wear International	Barnes, Ric 475 Park A New York,
83-04-00533	Men's Wear International	Barnes, Ric 475 Park A New York,
83-04-00534	Starlight Trading Inc.	Barnes, Ric 475 Park A New York,
83-04-00535	Starlight Trading Inc.	Barnes, Ric 475 Park A New York,
83-06-00920	Men's Wear International	Barnes, Ric 475 Park A New York,
83-08-01133	Melcher & Landau, Inc.	Barnes, Ris 475 Park A New York,
83-10-01428	Men's Wear International Inc.	Barnes, Ric 475 Park A New York,
83-12-01763	Men's Wear International Inc.	Barnes, Ric 475 Park A New York,

OSITION CALENDAR

ATTORNEY(S)/ADDRESS	DISMISS DATE	PORT(S)
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	Chicago, IL
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY
ichardson & Colburn Avenue South , NY 10016	891231	New York, NY

SUSPENSION DISPOSITION CAL

COURT NUMBER	PLAINTIFF	ATTORN
84-03-00399	Starlight Trading, Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
84-03-00400	Men's Wear International	Barnes, Richardson 475 Park Avenue So New York, NY 1001
84-12-01726	Men's Wear International, Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
84-12-01727	Starlight Trading Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
84-12-01816	Starlight Trading Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
85-01-00037	Starlight Trading, Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
85-01-00092	Starlight Trading Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
85-02-00239	Starlight Trading, Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
85-02-00240	Men's Wear International	Barnes, Richardson 475 Park Avenue So New York, NY 1001
85-03-00461	Men's Wear International, Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001
85-04-00589	Men's Wear International, Inc.	Barnes, Richardson 475 Park Avenue So New York, NY 1001

LENDAR — Continued

NEY(S)/ADDRESS	DISMISS DATE	PORT(S)
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	(Stip filed 890919)	
n & Colburn South 016	(Stip filed 890919)	
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	New York, NY

85-06-00766	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-06-00810	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-06-00869	Men's Wear International Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-08-01106	Men's Wear International Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01169	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01170	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01173	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01194	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01196	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01197	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-09-01198	Melcher & Landau, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016
85-10-01388	Starlight Trading, Inc.	Barnes, Richardson & Colburn 475 Park Avenue South New York, NY 10016

891231	Chicago, IL
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891231	New York, NY
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891231	Chicago, IL
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891231	Chicago, IL
891231	Chicago, IL
891231	New Orleans, LA
891231	Chicago, IL
891231	New York, NY

SUSPENSION DISPOSITION CAL

COURT NUMBER	PLAINTIFF	ATTORN
85-10-01478	Starlight Trading, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00305	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00306	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00307	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00308	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00309	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00310	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00311	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00312	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-03-00324	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100
86-07-00864	Melcher & Landau, Inc.	Barnes, Richardson 475 Park Avenue S New York, NY 100

LENDAR — Continued

NEY(S)/ADDRESS	DISMISS DATE	PORT(S)
n & Colburn South 016	891231	New York, NY
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Seattle, WA
n & Colburn South 016	891231	Chicago, IL
n & Colburn South 016	891231	Chicago, IL

86-07-00869	Melcher & Landau, Inc.	Barnes, Ri 475 Park A New York,
86-08-01039	Starlight Trading, Inc.	Barnes, Ri 475 Park A New York,
86-10-01256	Men's Wear International, Inc.	Barnes, Ri 475 Park A New York,
86-10-01257	M & L International L.P.	Barnes, Ri 475 Park A New York,
86-12-01602	M & L International Co., L.P.	Barnes, Ri 475 Park A New York,
87-01-00123	Melcher & Landau, Inc.	Barnes, Ri 475 Park A New York,
87-01-00125	M & L International Co., L.P.	Barnes, Ri 475 Park A New York,
87-02-00225	Melcher & Landau, Inc.	Barnes, Ri 475 Park A New York,
87-02-00229	Starlight Trading, Inc.	Barnes, Ri 475 Park A New York,
87-02-00262	Starlight Trading, Inc.	Barnes, Ri 475 Park A New York,
87-02-00327	Starlight Trading, Inc.	Barnes, Ri 475 Park A New York,
87-03-00449	Melcher & Landau, Inc.	Barnes, Ri 475 Park A New York,

ichardson & Colburn Avenue South k, NY 10016	891231	Chicago, IL
ichardson & Colburn Avenue South k, NY 10016	891231	New York, NY
ichardson & Colburn Avenue South k, NY 10016	891231	New York, NY
ichardson & Colburn Avenue South k, NY 10016	891231	Chicago, IL
ichardson & Colburn Avenue South k, NY 10016	891231	Chicago, IL
ichardson & Colburn Avenue South k, NY 10016	891231	Chicago, IL
ichardson & Colburn Avenue South k, NY 10016	891231	Chicago, IL
ichardson & Colburn Avenue South k, NY 10016	891231	Tacoma, WA
ichardson & Colburn Avenue South k, NY 10016	(Stip filed 890919)	
ichardson & Colburn Avenue South k, NY 10016	(Stip filed 890919)	
ichardson & Colburn Avenue South k, NY 10016	891231	New York, NY
ichardson & Colburn Avenue South k, NY 10016	891231	Chicago, IL

SUSPENSION DISPOSITION CALE

COURT NUMBER	PLAINTIFF	ATTORNE
87-03-00531	Melcher & Landau, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
87-08-00890	Men's Wear Int'l Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
87-09-00943	Melcher & Landau, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
87-10-01010	Starlight Trading, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
87-10-01039	Starlight Trading, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
87-11-01132	Men's Wear International, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
87-11-01133	Starlight Trading, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
88-01-00057	Starlight Trading, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
88-03-00240	Starlight Trading, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
88-07-00542	Melcher & Landau, Inc.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016
88-07-00546	M & L International Co., L.P.	Barnes, Richardson & 475 Park Avenue Sou New York, NY 10016

ENDAR — Continued

EY(S)/ADDRESS	DISMISS DATE	PORT(S)
& Colburn uth 6	891231	Seattle, WA
& Colburn uth 6	891231	New York, NY
& Colburn uth 6	891231	Chicago, IL
& Colburn uth 6	891231	New York, NY
& Colburn uth 6	(Stip filed 890919)	
& Colburn uth 6	891231	New York, NY
& Colburn uth 6	891231	New York, NY
& Colburn uth 6	891231	New York, NY
& Colburn uth 6	(Stip filed 890919)	
& Colburn uth 6	891231	Seattle, WA
& Colburn uth 6	891231	Chicago, IL

88-07-00547	Melcher & Landau, Inc.	Barnes, Richardson & C 475 Park Avenue South New York, NY 10016
85-04-00490	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-05-00736	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-07-00904	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-08-01049	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-09-01224	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-10-01504	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-11-01666	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-12-01708	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
85-12-01800	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
86-01-00112	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017

Colburn n	891231	Seattle, WA
bowitz & Silverman	900131	Savannah, GA New York, NY Boston, MA Atlanta, GA
bowitz & Silverman	900131	Chicago, IL Boston, MA
bowitz & Silverman	900131	Chicago, IL
bowitz & Silverman	900131	Boston, MA
bowitz & Silverman	900131	New York, NY Boston, MA Chicago, IL Savannah, GA
bowitz & Silverman	900131	New York, NY Chicago, IL
bowitz & Silverman	900131	Boston, MA
bowitz & Silverman	900131	New York, NY
bowitz & Silverman	900131	Boston, MA
bowitz & Silverman	900131	Chicago, IL

SUSPENSION DISPOSITION CA

COURT NUMBER	PLAINTIFF	ATTOR
86-02-00223	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-02-00224	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-04-00447	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-04-00508	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-04-00536	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-05-00590	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-05-00592	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-05-00616	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-05-00652	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-05-00654	Tawil Associates, Inc.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10
86-07-00889	Zayre Corp.	Grunfeld, Desideri 12 East 49th Stree New York, NY 10

ALENDAR — Continued

RNEY(S)/ADDRESS	DISMISS DATE	PORT(S)
rio, Lebowitz & Silverman et 0017	900131	Boston, MA
rio, Lebowitz & Silverman et 0017	900131	Atlanta, GA
rio, Lebowitz & Silverman et 0017	900131	Boston, MA
rio, Lebowitz & Silverman et 0017	900131	Savannah, GA
rio, Lebowitz & Silverman et 0017	900131	Chicago, IL
rio, Lebowitz & Silverman et 0017	900131	Chicago, IL
rio, Lebowitz & Silverman et 0017	900131	New York, NY
rio, Lebowitz & Silverman et 0017	900131	Boston, MA
rio, Lebowitz & Silverman et 0017	900131	New York, NY
rio, Lebowitz & Silverman et 0017	900131	New York, NY
rio, Lebowitz & Silverman et 0017	900131	Savannah, GA

86-07-00957	Zayre Corp.	Grunfeld, Desiderio, Lebowi 12 East 49th Street New York, NY 10017
86-08-00978	Zayre Corp.	Grunfeld, Desiderio, Lebowi 12 East 49th Street New York, NY 10017
86-09-01088	Zayre Corp.	Grunfeld, Desiderio, Lebowi 12 East 49th Street New York, NY 10017
86-09-01098	Zayre Corp.	Grunfeld, Desiderio, Lebowi 12 East 49th Street New York, NY 10017
86-09-01099	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
86-09-01101	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
86-09-01229	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
86-11-01463	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
86-12-01578	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
86-12-01618	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
86-12-01624	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017
87-02-00149	Zayre Corp.	Grunfeld, Desiderio, Lebow 12 East 49th Street New York, NY 10017

witz & Silverman	900131	New York, NY
witz & Silverman	900131	Boston, MA
witz & Silverman	900131	Boston, MA
witz & Silverman	900131	Savannah, GA
witz & Silverman	900131	Chicago, IL
witz & Silverman	900131	Chicago, IL
witz & Silverman	900131	Chicago, IL
witz & Silverman	900131	Chicago, IL
witz & Silverman	900131	New York, NY
witz & Silverman	900131	Boston, MA
witz & Silverman	900131	Chicago, IL
witz & Silverman	900131	Boston, MA

SUSPENSION DISPOSITION CALEN

COURT NUMBER	PLAINTIFF	ATTORNEY(
87-02-00210	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
87-02-00212	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
87-04-00570	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
87-04-00595	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
87-05-00663	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
87-06-00717	Tawil Associates	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
87-06-00737	Zayre Corp.	Grunfeld, Desiderio, Leb 12 East 49th Street New York, NY 10017
78-05-00959	Tawil Associates, Inc.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
79-06-01044	Tawil Associates Inc.	Mandel & Grunfeld 12 E New York, NY 10017
80-01-00175	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
80-05-00762	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017

NDAR — Continued

(S)/ADDRESS	DISMISS DATE	PORT(S)
bowitz & Silverman	900131	Savannah, GA
bowitz & Silverman	900131	Savannah, GA
bowitz & Silverman	900131	Atlanta, GA
bowitz & Silverman	900131	Boston, MA
bowitz & Silverman	900131	Boston, MA
bowitz & Silverman	900131	New York, NY
bowitz & Silverman	900131	New York, NY
	900131	New York, NY
East 49th Street	900131	New York, NY
	900131	Boston, MA
	900131	Chicago, IL

80-06-00886	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
80-07-01069	Tawil Association Inc.	Mandel & Grunf 12 East 49th Str New York, NY 1
80-07-01079	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
80-09-01465	Tawil Associates Inc.	Mandel & Grunf 12 East 49th Str New York, NY 1
80-11-00081	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
80-12-00114	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
80-12-00201	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
81-06-00684	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
81-07-00933	Tawil Associates Inc.	Mandel & Grunf 12 East 49th Str New York, NY 1
81-08-01086	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
81-10-01388	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1
81-11-01549	Zayre Corp.	Mandel & Grunf 12 East 49th Str New York, NY 1

nfeld reet 10017	900131	Boston, MA
nfeld reet 10017	900131	New York, NY
nfeld reet 10017	900131	Chicago, IL
nfeld reet 10017	900131	New York, NY
nfeld reet 10017	900131	Chicago, IL
nfeld reet 10017	900131	Boston, MA
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nfeld reet 10017	900131	New York, NY
nfeld reet 10017	900131	Boston, MA Chicago, IL
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SUSPENSION DISPOSITION CALEN

COURT NUMBER	PLAINTIFF	ATTORNEY(
82-02-00138	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
82-02-00251	Tawil Associates Inc.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
82-04-00564	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
82-07-01063	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
82-10-01411	Tawil Associates Inc.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
82-12-01762	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
83-03-00386	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
83-04-00627	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
83-05-00782	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
83-07-00993	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017
83-09-01393	Zayre Corp.	Mandel & Grunfeld 12 East 49th Street New York, NY 10017

NDAR — Continued

(S)/ADDRESS	DISMISS DATE	PORT(S)
	900131	Boston, MA Chicago, IL
	900131	New York, NY
	900131	Chicago, IL Boston, MA
	900131	Chicago, IL New York, NY Boston, MA
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	900131	Boston, MA Savannah, GA Los Angeles, CA Chicago, IL
	900131	Savannah, GA Chicago, IL Boston, MA New York, NY
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	900131	Savannah, GA Chicago, IL Los Angeles, CA
	900131	Chicago, IL Boston, MA Savannah, GA

83-10-01451	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-02-00265	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-06-00890	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-07-00979	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-09-01277	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-10-01458	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-11-01583	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-12-01798	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
85-02-00174	Zayre Corp.	Mandel & Gru 12 East 49th S New York, NY
84-06-00799	World Wide Winter Wear Ltd.	Rode & Quale 295 Madison A New York, NY
84-07-01028	World Wide Winter Wear Ltd.	Rode & Quale 295 Madison A New York, NY
84-12-01760	World Wide Winter Wear Ltd.	Rode & Quale 295 Madison A New York, NY

runfeld Street IY 10017	900131	Chicago, IL
runfeld Street IY 10017	900131	Boston, MA Savannah, GA Chicago, IL
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runfeld Street IY 10017	900131	Chicago, IL
runfeld Street IY 10017	900131	New York, NY
runfeld Street IY 10017	900131	New York, NY
ey Avenue IY 10017	900131	Seattle, WA
ey Avenue IY 10017	900131	Seattle, WA
ey Avenue IY 10017	900131	Seattle, WA

SUSPENSION DISPOSITION CALE

COURT NUMBER	PLAINTIFF	ATTORNEY
85-03-00445	World Wide Winter Wear Ltd.	Rode & Qualey 295 Madison Avenue New York, NY 10017
85-03-00446	World Wide Winter Wear Ltd.	Rode & Qualey 295 Madison Avenue New York, NY 10017
85-03-00448	World Wide Winter Wear Ltd.	Rode & Qualey 295 Madison Avenue New York, NY 10017
85-03-00449	World Wide Winter Wear Ltd.	Rode & Qualey 295 Madison Avenue New York, NY 10017
85-06-00783	World Wide Winter Wear Ltd.	Rode & Qualey 295 Madison Avenue New York, NY 10017
85-10-01411	World Wide Winter Wear Ltd.	Rode & Qualey 295 Madison Avenue New York, NY 10017
81-01-00098	Alligator Co. Div. of General Mills, Inc.	Siegel, Mandell & Davi One Whitehall Street New York, NY 10004
81-03-00351	Haymaker Sports Div. of General Mills	Siegel, Mandell & Davi One Whitehall Street New York, NY 10004
81-07-00966	Alligator Co. Div. of General Mills, Inc.	Siegel, Mandell & Davi One Whitehall Street New York, NY 10004
81-09-01295	Haymaker Sports Div. of General Mills	Siegel, Mandell & Davi One Whitehall Street New York, NY 10004
81-09-01298	Izod Outerwear Dept. Div. of General Mills	Siegel, Mandell & Davi One Whitehall Street New York, NY 10004

ENDAR — Continued

Y(S)/ADDRESS	DISMISS DATE	PORT(S)
	900131	New York, NY
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vidson	900131	New York, NY

82-01-00008	Izod Outerwear Div. of General Mills	Siegel, Mandell & One Whitehall Str New York, NY 10
82-06-00807	Haymaker Sports Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
82-12-01692	Izod Outerwear Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
82-12-01694	Izod Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
82-12-01696	Izod Outerwear Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
82-12-01781	Izod J.G. Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
82-12-01783	Haymaker Sports Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
82-12-01785	Izod Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
83-06-00897	The Alligator Co. Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
83-09-01258	Izod Outerwear Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
83-12-01758	Izod Embroidery Div. of General Mills, Inc.	Siegel, Mandell & One Whitehall Str New York, NY 10
85-11-01588	Winter Industries	Stein, Shostak, Sh 3580 Wilshire Bou Los Angeles, CA 9

& Davidson treet 0004	900131	New York, NY
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& Davidson Street 10004	900131	New York, NY
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& Davidson Street 10004	900131	New York, NY
Shostak & O'Hara oulevard . 90010-2597	900122	Los Angeles, CA

SUSPENSION DISPOSITION CALE

COURT NUMBER	PLAINTIFF	ATTORNEY
86-05-00629	Snowdown International Corp.	Stein, Shostak, Shostal 3580 Wilshire Bouleva Los Angeles, CA 9001C
86-06-00692	The Newman Importing Co., Inc.	Stein, Shostak, Shostal 3580 Wilshire Bouleva Los Angeles, CA 9001C
86-06-00803	The Newman Importing Co., Inc.	Stein, Shostak, Shostal 3580 Wilshire Bouleva Los Angeles, CA 9001C
86-07-00966	The Newman Importing Co.	Stein, Shostak, Shostal 3580 Wilshire Bouleva Los Angeles, CA 9001C
85-12-01828	Izod Ltd. Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004
86-03-00406	Izod Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004
86-03-00410	Haymaker Sports Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004
86-03-00413	Izod for Infants & Toddlers Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004
86-03-00416	Izod Womenswear Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004
86-04-00421	Izod Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004
86-05-00636	Izod Women's Wear Div. of General Mills, Inc.	Siegel, Mandell & Dav One Whitehall Street New York, NY 10004

ENDAR — Continued

EY(S)/ADDRESS	DISMISS DATE	PORT(S)
ak & O'Hara ard 10-2597	900122	San Francisco, CA
ak & O'Hara ard 10-2597	900122	Los Angeles, CA
ak & O'Hara ard 10-2597	900122	Los Angeles, CA
ak & O'Hara ard 10-2597	900122	Los Angeles, CA
vidson	900131	New York, NY
vidson	900131	New York, NY
vidson	900131	New York, NY
vidson	900131	New York, NY
vidson	900131	New York, NY
vidson	900131	New York, NY
vidson	900131	New York, NY

84-03-00326	Izod Outerwear Div. of General Mills	Siegel, Mandell & I One Whitehall Str New York, NY 100
84-10-01504	Izod Outerwear Div. of General Mills	Siegel, Mandell & I One Whitehall Str New York, NY 100
84-11-01540	Haymaker Sports Div. of General Mills, Inc.	Siegel, Mandell & I One Whitehall Str New York, NY 100
85-02-00300	Izod Embroidery Div. of General Mills, Inc.	Siegel, Mandell & I One Whitehall Str New York, NY 100
85-09-01343	Izod Outerwear Div. of General Mills, Inc.	Siegel, Mandell & I One Whitehall Str New York, NY 100
85-12-01703	Izod Outerwear Div. of General Mills, Inc.	Siegel, Mandell & I One Whitehall Str New York, NY 100
85-12-01816	Haymaker Sports Div. of General Mills, Inc.	Siegel, Mandell & I One Whitehall Str New York, NY 100
85-12-01817	Izod Outerwear Div. of General Mills	Siegel, Mandell & I One Whitehall Str New York, NY 100

Davidson reet 004	900131	New York, NY
Davidson reet 004	900131	New York, NY
Davidson reet 004	900131	New York, NY
Davidson reet 004	900131	New York, NY
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Davidson reet 004	900131	New York, NY

(Slip Op. 89–143)

A CLASSIC TIME, ET. AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court Nos. 87–08–00862, and as per schedule attached

[Motions vacating orders of dismissal granted.]

(Decided October 16, 1989)

Irving A. Mandel for plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*James A. Curley*), Civil Division, United States Department of Justice, for defendant.

MEMORANDUM OPINION AND ORDER

RESTANI, *Judge:* These actions were dismissed by the Clerk of the Court on various dates, from September 8, 1988 to March 9, 1989 pursuant to Rule 83(c) of this court[1]. This matter is before the court on plaintiffs' motions pursuant to Rule 60(b)(1) for orders granting relief from the orders of dismissal, because of mistake, inadvertence, surprise, or excusable neglect.

I. *Dismissal of plaintiffs' actions was due to mistake, inadvertence, surprise, or excusable neglect.*

Plaintiffs base these motions upon the existence of mistake, inadvertence, surprise, or excusable neglect created by the discordant dissolution of the firm which acted as plaintiffs' former counsel. Plaintiffs also allege that the attorney in charge of litigation suffered from a serious psychological or physical illness during the pendency of these actions which required long term treatment. Plaintiffs' present counsel, a former partner of the allegedly infirm counsel, claims that such illness prevented former counsel from properly monitoring these cases and removing them from the Reserve Calendar by filing complaints or motions to suspend under a test case.

This court has previously granted motions under Rule 60(b) to relieve various other plaintiffs from dismissals due to lack of prosecution because of factual circumstances related to those before the court. *See Bio-Rad Laboratories, Inc.* v. *United States,* 12 C.I.T. ——, 687 F. Supp. 1580 (1988); *Carisbrook Industries, Inc.* v. *United States,* Slip. Op. 89–130 (Sept. 14, 1989). Defendant, however, claims that plaintiffs in this motion have failed to show that their failure to prosecute these cases was due to mistake, inadvertence, surprise, or excusable neglect. To support this contention, defendant attaches to the appendix of its memorandum a letter written by former counsel to the Clerk of The Court on August 28, 1987, explaining that the former partners of the dissolving partnership still had responsibility for its unfinished work. According to defendant, this "shows that whatever ailment [counsel] might have suffered, was cured

[1]Rule 83(c) mandates dismissal of an action for failure to remove the action from the reserve calendar within the 12-month reserve calendar period.

and/or substantially under control by August 1987 when this case was brought and [the] letter was sent to the Clerk." D. Mem. at 3.

This court has previously noted, however, that "it does not appear that those problems were solved by March of 1988." *Carisbrook,* Slip. Op. 89–130, *supra,* at 3. The evidence before the court indicates that former counsel's illness was of a long term nature and likely caused him to neglect to prosecute these cases, although at times he may have acted appropriately. *See* Affidavit attached to Plaintiff's Reply to Defendant's Opposition to the Motion for Relief from Dismissal at para. 7. Therefore, *Kagan* v. *Caterpillar Tractor Co.,* 795 F.2d 601 (7th Cir. 1986), cited by defendant, is inapposite. In that case, plaintiff's attorney contracted spinal meningitis. He recovered in time for the pretrial conference, but was unable to attend or answer the motion to dismiss because he was in the middle of another trial. *Id.* at 603–04. Moreover, the law firm he was associated with broke up. *Id.* at 603. Nevertheless, the court denied plaintiff's Rule 60(b) motion. *Id.* at 608–09. The court's rationale, however, was not that a lawyer's illness is not excusable under Rule 60(b). In fact, the court noted that, by the attorney's own testimony, he had recovered by the pretrial conference date. *Id.* at 608. Rather, the court reasoned that involvement in another trial during the pretrial conference did not excuse counsel's neglect. *Id.* As this court noted in *Bio-Rad,* however, illness of an attorney, coupled with other factors, can cause excusable neglect. 687 F. Supp. at 1581.

II. *Plaintiffs brought their 60(b)(1) motions in a timely manner.*

Rule 60(b) requires that "[t]he motion shall be made within a reasonable time, and [when based upon Rule 60(b)(1)]not more than one year after the judgment, order, or proceeding was entered or taken." Plaintiffs made their 60(b)(1) motions on August 28, 1989, within one year of the orders of dismissal. However, defendant claims that plaintiffs failed to move within a reasonable time.

This court concludes otherwise. It does not appear that plaintiffs became aware of the dismissals until mid-June, 1989, when they were contacted by another former partner of the dissolving firm who indicated there was a possibility that the cases survived. Plaintiffs then contacted their present counsel, who discovered the dismissals and filed these motions about two months later. The cases cited by defendant in support of its contrary contention are inapposite.

In *Morgan* v. *Southern Farm Bureau Casualty Ins. Co.,* 42 F.R.D. 25, 27 (W.D. La. 1967) the court denied plaintiff's 60(b) motion because it was brought 23 months after affirmance of the judgment. The court in *Mayfair Extension, Inc.* v. *Magee,* 241 F.2d 453, 453–54 (D.C. Cir. 1957) (per curiam) denied plaintiff's 60(b) motion brought 11 months after it was advised of the judgment from which it sought relief. Finally, the court in *Coclin Tobacco Co., Inc.* v. *Brown & Williamson Tobacco Corp.,* 353 F.2d 727, 728 (2d Cir. 1965) (per

curiam) denied plaintiff's 60(b) motion brought two years after an order of dismissal and six months after plaintiff learned of the dismissal. While the court concluded that the six month delay between the discovery of the dismissal order and the filing of the motion was untimely, *id.* at 728, the Second Circuit has more recently suggested that any 60(b) motion brought within one year is timely. *See United States* v. *Cirami*, 535 F.2d 736, 742 (2d Cir. 1976). As FED. R. CIV. P. 60(b) and CIT Rule 60(b) are identical in all relevant ways, cases from the regional circuits are useful precedent. The court, however, need not adopt a blanket rule to resolve this matter and it does not do so. The two-month delay from discovery of the dismissal to filing of the motions was not unreasonable under the circumstances.

In the motion at bar, plaintiffs brought their 60(b)(1) motions within the one year time limit and about two months after they learned of the dismissals. The court considers this to be timely.

Conclusion

This court, after examination of the papers filed herein, concludes that the dismissals for lack of prosecution of these actions resulted from mistake, inadvertence, surprise, or excusable neglect. Moreover, plaintiffs brought their 60(b)(1) motions in a timely fashion.

It is therefore ORDERED that plaintiffs' motions are granted and that these actions be reinstated on the Reserve Calendar. These actions may remain there up to and including November 30, 1989.

Schedule

Court No.	Dismissed	Plaintiff
87-08-00862	Sept. 8, 1988	A Classic Time
87-08-00863	Sept. 8, 1988	Accutime Watch Corp.
87-08-00864	Sept. 8, 1988	S.K. Suppliers
87-08-00865	Sept. 8, 1988	Wallem International Corp.
88-02-00068	Mar. 9, 1989	F&K Watch
88-02-00096	Mar. 9, 1989	A Classic Time
87-08-00866	Sept. 8, 1988	Miracle Watch Co.
87-09-00922	Oct. 5, 1988	Eastman Watch Corp.

(Slip Op. 89-144)

TELEFLORA PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-09-01352

Memorandum Opinion and Order

The Customs Service classified certain wooden floral containers as "[h]ousehold utensils and parts thereof, all the foregoing not specially provided for, of wood," under item 206.98, TSUS. Plaintiff protests the classification and contends that the

imported merchandise is properly classifiable as "containers and holders chiefly used for packing, transporting, or marketing merchandise, * * * of wood," under item 204.30, TSUS, or as "[a]rticles not specially provided for, of wood," under item 207.00, TSUS.

Held: The imported merchandise was incorrectly classified under item 206.98. There remains a question as to which of plaintiff's alternatives the imported merchandise is properly classifiable under. Judgment is entered for plaintiff, based on a concession of the government that if either of plaintiff's alternative classifications is correct, the imported merchandise is entitled to duty-free treatment under the Generalized System of Preferences.

[Judgment for plaintiff.]

(Dated October 16, 1989)

Stein Shostak Shostak & O'Hara, (*Joseph P. Cox* on the briefs and at trial, and *Marjorie M. Shostak* on the trial brief and appearance at trial), for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, (*Joseph I. Liebman* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Taiwan and described on the customs invoice as "wood floral containers."

The merchandise was classified by the Customs Service as "[h]ousehold utensils and parts thereof, all the foregoing not specially provided for, of wood," under item 206.98 of the Tariff Schedules of the United States (TSUS), with duty at the rate of 5.1 per centum *ad valorem.*

Plaintiff protests this classification, and contends that the imported merchandise should properly be classified as "containers and holders chiefly used for packing, transporting, or marketing merchandise, * * * of wood," under item 204.30, TSUS, or, alternatively, as "[a]rticles not specially provided for, of wood," under item 207.00, TSUS. Plaintiff contends that, under either of its alternative classifications, the merchandise is entitled to duty-free treatment under the Generalized System of Preferences (GSP).

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 2, Part 1, Subpart E:

Household utensils and parts thereof, all the foregoing not specially provided for, of wood:

* * * * * * *

Other:

* * * * * * *

206.98 Other .... 5.1% *ad val.*

Claimed under:

Schedule 2, Part 1, Subpart D:

Complete packing boxes, cases, and crates, and other containers and holders chiefly used for packing, transporting, or marketing merchandise, all the foregoing (except baskets and coopers' products) of wood, whether wholly or partly assembled or not assembled:

* * * * * * *

204.30 Other .... duty-free (GSP)

Alternative claim of plaintiff:

Schedule 2, Part 1, Subpart F:

207.00 Articles not specially provided for, of wood .... duty-free (GSP)

The question presented is whether the imported merchandise has been properly classified by Customs, and, therefore, is dutiable as "[h]ousehold utensils * * * of wood," under item 206.98, TSUS, or is entitled to duty-free treatment, as claimed by plaintiff, as "containers and holders chiefly used for packing, transporting, or for marketing merchandise, * * * of wood," under item 204.30, TSUS, or, alternatively, as "[a]rticles not specially provided for, of wood," under item 207.00, TSUS.

In order to decide the question presented, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878, *reh'g denied,* 739 F.2d 628 (Fed. CIr. 1984). Pursuant to 28 U.S.C. § 2639(a)(1) (1982), the government's classification is presumed to be correct, and the burden of proof is upon the party challenging the classification.

After an examination of the merchandise, pertinent tariff provisions, relevant case law and the testimony of record it is the determination of the court that the plaintiff has overcome the presumption of correctness that attaches to the government's classification. For the particular entries involved in this case, the government conceded at trial that, if the imported merchandise is properly classifiable under either of plaintiff's alternative claimed classifications, it is entitled to duty-free treatment under the GSP. A question remains as to which of plaintiff's alternatives the imported merchandise is properly classifiable under. Since both of plaintiff's claimed classifications provide for duty-free treatment, it is not necessary for the court to classify the merchandise under either provision.

The imported wood floral containers consist of wood objects, each having a flat base approximately six inches long by two and a half inches wide. Attached to the base are four rolling wheels. Fastened to the top of the base, and to one side, are painted vignettes of wood which represent the theme characters associated with one of three

popular nursery rhymes: "Little Boy Blue," "Humpty Dumpty," or "Mary Had A Little Lamb."

Also attached to the base, next to the characters, is a cylindrical receptacle made up of a disc-shaped bottom and a circular top, joined by spokes of wood which are spaced equal distances from each other. The receptacle is approximately the same height of the wooden vignettes. A waterproof hard plastic insert, shaped like a small flower pot or plastic cup, fits into the cylindrical receptacle and functions as a container for the floral arrangements and plants.

Each of the models of the wood floral containers is made in a "musical" and "non-musical" variety. The wooden receptacle of the musical variety has a mechanical base and contains a music box. The music box is activated when the wood receptacle is twisted or turned.

Plaintiff, Teleflora Products, Inc., is a clearing house for florists. It serves approximately 17,000 member florists in the United States. Its chief role is to provide a wire service for its members, allowing them to place phone orders and send flowers throughout the country. In addition, plaintiff provides products and other services to its member florists.

Plaintiff's first witness was Ms. Rocky Pollitz, its vice president of industry relations. During the importation of the contested merchandise, Ms. Pollitz was plaintiff's director of product development.

Ms. Pollitz identified the imported merchandise as "floral containers." Ms. Pollitz testified that the imported floral containers were developed by plaintiff as part of its "keepsake program." According to Ms. Pollitz, plaintiff's keepsake program was a company plan to develop products, for its member florists, that would increase sales of flowers by providing floral containers "that may be something [purchasers] could keep."

Ms Pollitz testified that plaintiff used a one page mailer, with color photographs and accompanying text, to market the imported merchandise to its members. The mailer was sent to all of plaintiff's member florists. The front of the mailer pictured the imported merchandise with a floral display. Ms. Pollitz explained that:

> We have to always stress how well it looks with flowers. It's very important we do a very descriptive part in our literature about how well flowers go.
>
> *　*　*　*　*　*　*
>
> Then the next thing we all talk about in our promotion is how reasonable it is so the florists can make a sizeable profit by buying [our] product.

She stated that the imported merchandise was produced with nursery rhyme characters because "[t]hey were meant to appeal to small children; and also to serve as a floral container for baby arrangements * * *." Ms. Pollitz noted that, typically, the imported

merchandise was purchased from a florist, with an accompanying floral display, as a gift for a newborn child.

Ms. Pollitz testified that the plastic insert, which fits into the wooden receptacle on the base of the imported merchandise, is designed to contain a floral display. She added that all the containers were provided with a plastic insert, and stated that plaintiff's members had "never ordered [the imported merchandise] without" the plastic inserts. She explained that plaintiff sold the imported merchandise only to its member florists, because "[i]n order to buy a Telaflora [sic] product you must be a subscriber. That's one of the rules and regulations of our organization."

On cross examination, Ms. Pollitz admitted that, once plaintiff sells the imported merchandise to its member florists, there are no restrictions on how the florist may sell or use the merchandise. Consequently, Ms. Pollitz agreed that the members "are free to sell the imported merchandise by itself, or with flowers in it, or with plants in it, or anything else they care to place in it [.]" She stressed, however, that the floral containers were "not meant to last forever[,]" and stated that they were "made to last a period of time." She agreed that they were meant to last "longer than any floral arrangement that might be placed in them."

Plaintiff's second witness was Mr. Maurice Craig, a florist who is a member and previous officer of Teleflora. Mr. Craig stated that, as a florist, he sold the imported merchandise as a floral container. He was asked how a purchaser usually carried the imported merchandise with an accompanying floral display, out of the store. Mr. Craig responded that the customer would usually carry the product "[a]s is[.]" He denied that he would "place [the product] in another container or another retail container such as a bag." Mr. Craig stated that he had never sold the imported merchandise without a plant, or floral display.

On cross examination, the government sought to elicit testimony from Mr. Craig showing that he sold the imported merchandise by informing customers of its possible alternative uses. Mr. Craig was questioned about plaintiff's mailer, which advertised the imported merchandise. While the front of the mailer depicted the imported merchandise used as a floral container, the reverse side portrayed the merchandise with a plant in the plastic insert. Other images on the reverse side of the mailer showed the merchandise, without the plastic insert, used as a container for an infant's toilet articles and small toys.

Mr. Craig denied "ever describ[ing] to customers any of the uses they may make of the imported merchandise after any floral arrangement or plant has served its useful purpose[.]" He did state, however, that "[w]e try to make it a second sale when we sell it for flowers because we tell them they can bring it back and have plants planted in the container."

Plaintiff contends that the imported merchandise does "not come within the common meaning of household utensils," and, therefore, has been incorrectly classified. In contrast, the government argues that "the imported merchandise, which initially serves as a container * * * for flowers and/or plants, and which is intended and designed to be reusable for plants and other personal possessions of infants and young children, are articles of utility used in the household."

It is axiomatic in customs law that tariff items "are to be construed to carry out the intent of the legislature." *Nippon Kogaku (USA), Inc.* v. *United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). In determining congressional intent, the court must determine the "common meaning" of the tariff term, and "may * * * consult dictionaries, scientific authorities, and other reliable sources of information including testimony of record." *Id.* at 92–93, 673 F.2d at 382. At the trial, plaintiff introduced a definition of the word "utensil" as "any implement or container ordinarily used in a kitchen, dairy, or the like: as, cooking *utensils*[,]" or "any implement or tool, as for use in farming, etc." *The Webster's New World Dictionary of the American Language* 1605 (1956) (italics in original). After hearing the definition, Ms. Pollitz stated that, in her opinion, the imported merchandise was not a "utensil." Both Ms. Pollitz and Mr. Craig testified that they had never heard of the imported merchandise being referred to as a "utensil." They were firm in their opinion and belief that the wood floral containers were not household utensils.

In its brief, the government cites an extremely expansive definition of "utensil." The government defines a "utensil" as "an article (as a tool, implement, or vessel) serving a useful purpose * * *." *Webster's Third New International Dictionary of the English Language* 2525 (1965). The evidence indicates that the imported merchandise could serve "a useful purpose." Clearly, serving as a floral container is a "useful purpose." Besides serving as a floral container, the merchandise could, as depicted on the reverse side of plaintiff's mailer, serve as a holder for a plant or for small articles, such as an infant's toys or toilet articles. If the government's expansive definition of "household utensil" were to be taken literally, it would encompass a variety of articles that clearly are not "household utensils" in the tariff sense of the term, i.e., for customs classification purposes.

In *The Akron* v. *United States,* 60 Cust. Ct. 60, C.D. 3259 (1968), the imported merchandise consisted of cast-iron garden furniture. It was classified by Customs as "articles, not specially provided for, wholly or in chief value of base metal." *Id.* at 61. Plaintiff contested the classification and contended that the merchandise should have been classified as "other household utensils, not specially provided for, in chief value of metal * * *." *Id.* The Customs Court sustained the classification, and, after considering three dictionary definitions

of "utensil," noted that "a utensil is an article which possesses the attributes of an implement or a tool, designed to accomplish a given objective." *Id.* at 63.

In *New York Merchandise Co.* v. *United States,* 62 Cust. Ct. 674, 674, C.D. 3847 (1969) the imported merchandise consisted of certain "tie racks, coat hangers, towel racks, towel rings, toilet paper holders, soap dishes, and towel bars * * *." It was classified by Customs as "articles wholly or in chief value of steel (tie racks) or of brass (all other items)." *Id.* at 675. Plaintiff contested the classification, and contended that the merchandise should have been classified as "household utensils," either of brass or of steel. The Customs Court sustained the classification, and defined a "utensil" as " 'something that is used; a thing serving a useful purpose[,]' * * * 'an instrument or implement.' " *Id.* at 677 (quoting *J.C. De Jong & Co.* v. *United States,* 52 CCPA 26, 28, C.A.D. 852 (1965)).

It is important to note that the *Summaries of Trade and Tariff Information* state that "[a] household utensil [of wood] for tariff purposes is an article used chiefly in the home where *it serves some useful purpose in the operation of housekeeping.*" *Summaries of Trade and Tariff Information,* sched. 2, vol. 2, p. 97 (1968) (emphasis added). Furthermore, according to the *Explanatory Notes to the Brussels Nomenclature,* the heading for "household utensils of wood" "covers *only* those articles of wood * * * which are essentially of the nature of tableware or kitchen or household implements; *it does not,* however, *cover* goods which are primarily ornamental in character * * *." *Explanatory Notes to the Brussels Nomenclature,* vol. 2, sect. IX, ch. 44.24 (1969) (emphasis in original).

In customs classification cases it is often stated that "samples of the merchandise may be 'potent' witnesses." *Permagrain Prods., Inc.* v. *United States,* 9 CIT 426, 429, 623 F. Supp. 1246, 1249 (1985) (citing *Marshal Field & Co.* v. *United States,* 45 CCPA 72, 81, C.A.D. 676 (1958)), *aff'd,* 791 F.2d 914 (Fed. Cir. 1986). A close examination of the merchandise in question shows that it could not serve as a "household utensil," in the sense that those words are used in the Summaries of Trade and Tariff Information and the Explanatory Notes to the Brussels Nomenclature. The merchandise cannot be used in "the operation of housekeeping." Indeed, its prime function would seem to be ornamental. The receptacle is not large enough to hold anything but very small objects. In addition, the attached rolling wheels and the overall lack of sturdiness of the merchandise make it unlikely to last any significant period of time. Since the merchandise is not a "household utensil" in the tariff sense of the term, the imported merchandise was incorrectly classified by Customs.

Plaintiff contends that the imported merchandise should be classified according to its "chief use." General Interpretative Rule 10(e)(1) of the TSUS provides that:

> (e) in the absence of special language or context which otherwise requires—
>
> (1) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, or articles of that class or kind to which the imported articles belong, *and the controlling use is the chief use,* i.e., the use which exceeds all other uses (if any) combined * * *.

(emphasis added). By its terms, plaintiff's claimed classification, "containers and holders chiefly used for packing, transporting, or marketing merchandise, * * * of wood," is governed by the "chief use" of the merchandise.

The "chief use" of imported merchandise "is a question of fact to be determined on the basis of positive testimony." *Riekes Crisa Corp.* v. *United States,* 84 Cust. Ct. 132, 142, C.D. 4852 (1980) (citing *L. Tolbert Co.* v. *United States,* 41 CCPA 161, C.A.D. 544 (1953)). In support of its contention, plaintiff maintains that the imported merchandise "are containers for marketing or transporting of flowers, plants, and floral arrangements, that they are all so used, and that they were designed and intended and offered and sold in the trade and commerce of the United States solely for that use."

The evidence indicates that the "chief use" of the imported merchandise was as floral containers. Plaintiff marketed the merchandise exclusively for its member florists, as decorative containers for floral displays. The trial testimony of Ms. Pollitz, and the text of plaintiff's mailer, introduced at trial, revealed clearly that plaintiff intended and hoped that the imported merchandise would stimulate sales of floral displays.

In *Venaire Shade Corp.* v. *United States,* 66 Cust. Ct. 469, 472, C.D. 4235 (1971), it was stated that "[a]lthough the manner in which an article is marketed is not, of itself, determinative of its classification, it does, of course, have obvious probative value." In this case, the government notes that the imported merchandise "is designed and intended to be part of a 'Keepsake Program' for those people who want something more than just flowers." The evidence, however, is insufficient to show that plaintiff marketed the imported merchandise as a "keepsake."

Although part of plaintiff's "keepsake program," the wood floral containers were designed and intended to be used by florists in promoting the sale of flowers. The testimony reveals clearly that they were usually sold with a floral display as a gift for a newborn child. The mailer, or promotional piece, which pictured alternative uses for the imported merchandise, was a private correspondence between plaintiff and its members, and was not for display. It was mailed to plaintiff's florist members, and not to the public at large. Furthermore, no evidence indicated that florists ever sold the imported merchandise without a floral display or plant, or that florists

ever suggested to customers that the imported merchandise could be used other than as a floral container.

It is also basic in customs law that " '[c]hief use' * * * means the principal or predominant use. It does not envision exclusive use, but rather contemplates the usual and common use." *Howland* v. *United States,* 53 CCPA 62, 64, C.A.D. 878 (1966). As stated by the Customs Court, " '[a] fugitive use or a mere susceptibility or capability of use is not controlling as to such chief use.' " *Riekes Crisa Corp.,* 84 Cust. Ct. at 145 (quoting *United States* v. *Baltimore & O. R.R.,* 47 CCPA 1, 5, C.A.D. 719 (1959)). In light of the specific manner in which the imported merchandise was overwhelmingly used, its use as a container for small articles, such as an infant's small toys or toilet articles, is a "fugitive use."

While it is clear that the imported merchandise is "chiefly used for packing, transporting, or marketing merchandise," there remains a question as to whether it is more properly classifiable as "[a]rticles not specially provided for, of wood," plaintiff's alternative claim. As the government notes in its brief, the imported merchandise "is not the routine usual type container used to transport and/or package merchandise in the stream of commerce."

In the *Summaries of Trade and Tariff Information,* it is stated that "those articles of wood which are not more specifically provided for elsewhere, and used in the household as a novelty, decoration, or adornment, have been considered to be articles of wood not elsewhere enumerated (Item 207.00)." *Summaries of Trade and Tariff Information,* sched. 2, vol. 2, p. 97 (1968). According to the testimony of both witnesses, the merchandise, which is brightly colored and decorated in order to appeal to children, is also known in the floral industry as a "baby novelty."

At trial, the government conceded "that the particular items for the entries involved in this case met the requirements [for duty-free treatment] with regard to the eligibility to the [GSP]." Since both of plaintiff's alternative claimed classifications allow for GSP treatment, the imported merchandise is entitled to duty-free treatment.

It is important to note that this is a "test case," as established by Rule 84(b) of the Rules of the United States Court of International Trade, and that there are presently four cases suspended under this test case. The government has not conceded that any entries involved in cases suspended under this test case have met the requirements for duty-free treatment under the GSP.

In view of the foregoing, the court has determined that plaintiff has overcome the presumption of correctness that attaches to the classification by Customs, and that the imported merchandise is incorrectly classified as "[h]ousehold utensils." Accordingly, without classifying the imported merchandise, judgment is entered for the plaintiff.

(Slip Op. 89–145)

CAMBRIDGE LEE INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AMERICAN BRASS, ET AL., DEFENDANT-INTERVENORS

Court No. 88–09–00714

[Motion for preliminary injunction denied.]

(Decided October 18, 1989)

Sharretts, Paley, Carter & Blauvelt (*Gail T. Cumins, Beatrice A. Brickell, Ned H. Marshak*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*M. Martha Ries*); *Lyn M. Schlitt*, General Counsel, *Judith M. Czako*, Acting Assistant General Counsel, United States International Trade Commission (*Calvin H. Cobb, III*), for defendant.

Collier, Shannon & Scott (*Jeffrey S. Beckington, David A. Hartquist*, and *Kathleen Weaver Cannon*) for defendant-intervenors.

DICARLO, *Judge:* Cambridge Lee, a United States importer of brass sheet and strip, moves this Court to enjoin liquidation of "any and all" entries of Japanese brass sheet and strip covered by the notice of opportunity to request an administrative review published in 54 Fed. Reg. 32,364 (Aug. 7, 1989), *amended* 54 Fed. Reg. 34,282 (Aug. 18, 1989). Movant requests the injunction during the pendency of litigation before this Court challenging the final affirmative injury determination of the United States International Trade Commission in *Certain Brass Sheet and Strip From Japan and The Netherlands*, Inv. Nos. 731–TA–379 and 380 (Final), USITC Pub. No. 2099 (July, 1988).

The motion for a preliminary injunction is denied.

BACKGROUND

In 1984, Congress replaced the mechanism for automatic administrative review of dumping and CVD determinations under section 1675 of the Trade Agreements Act of 1979 with a procedure whereby such reviews would be held only upon request by an interested party, 19 U.S.C. § 1675(a)(1) (1982 and Supp. V. 1987). Should a party request an administrative review, entries made during the twelve months immediately preceding the anniversary month of the dumping determination or the last annual review remain unliquidated. Customs then continues to collect estimated duties on those entries. In the absence of a request for a review, 19 C.F.R. § 353.53a(d)(1) provides for liquidation of entries and warehouse withdrawals at the rate estimated in the antidumping determination or the most recent administrative review. Liquidation removes entries from the effect of any subsequent judicial decision. *See* 19 U.S.C. § 1516a(c)(1), (e) (1982).

DISCUSSION

The question presented is whether a preliminary injunction against automatic liquidation of entries pending the outcome of judicial review of the underlying affirmative agency determination is available when the party seeking injunctive relief has not requested an administrative review pursuant to 19 U.S.C. § 1675(a)(1). The court has encountered this same issue on several occasions since the implementation of the procedure for elective administrative review.

In *Fundicao Tupy, S.A.* v. *United States,* 11 CIT ——, 669 F. Supp. 1525 (1987) (*Tupy I*),[1] a unanimous three-judge panel held that a party that failed to avail itself of the administrative review procedure was unable to establish irreparable harm necessary to obtain injunctive relief. The *Tupy I* court reasoned:

> Had plaintiffs chosen to incur the expense of participating in an administrative review, the opportunity to obtain judicial review as to entries covered by that administrative proceeding could be protected. However, given the failure to seek such a review, [19 C.F.R.] § 353.53a(d), in effect, specifies the amount of the duties owed on the subject entries. Any harm, therefore, that the plaintiffs may suffer if the entries are liquidated is undeniably the result of their failure to utilize the administrative remedy provided.

Id. at ——, 669 F. Supp. at 439.

Shortly after the *Tupy I* decision, another judge of this court held that a party need not request a review in order to preserve its rights for injunctive relief. *OKI Elec. Indus. Co.* v. *United States,* 11 CIT ——, 669 F. Supp. 480 (1987). The *OKI* court found that 19 C.F.R. § 353.53a(d) is inapplicable when the underlying dumping order is being challenged. *Id.* at ——, 669 F. Supp. at 485.

Since the decisions in *Tupy I* and *OKI,* there has been a continuing split of authority within the Court of International Trade whether a party must request an annual administrative review in order to obtain an injunction against liquidation. Two subsequent cases have followed the precedent set by *Tupy. NTN Bearing Corp. of Am.* v. *United States,* 12 CIT ——, 701 F. Supp. 226 (1988); *Fundicao Tupy, S.A.* v. *United States,* 12 CIT ——, 696 F. Supp. 1525 (1988) (*Tupy V*). Others have followed the reasoning set forth in *OKI. Sonco, Inc.* v. *United States,* 13 CIT ——, 698 F. Supp. 927 (1989); *Ipsco, Inc.* v. *United States,* 12 CIT ——, 692 F. Supp. 1368 (1988).

Although *OKI* and its progeny raise well-reasoned arguments, they are not sufficiently compelling to persuade the Court to deviate from the position taken in *Tupy I.* The availability of the annual administrative review affords the movant adequate alternatives to safeguard its rights. As the court stated in *NTN Bearing,* "[t]o grant injunctive relief under the facts of this case would be to reward the

[1] For the subsequent history of this case, *see NTN Bearing Corp. of Am.* v. *United States,* 12 CIT ——, 701 F. Supp. 226, 227 n.3 (1988).

plaintiffs for thwarting the administrative process." 12 CIT at ——, 701 F. Supp. at 228. Accordingly, the Court denies movant's motion for injunctive relief.

This conflict within the Court of International Trade creates great uncertainty for litigants, which will continue until the Federal Circuit has an opportunity to resolve this issue.

Conclusion

The motion for a preliminary injunction is denied.

(Slip Op. 89–146)

E.M. Chemicals, plaintiff *v.* United States, defendant

Court No. 85–11–01610

(Decided October 18, 1989)

Freeman, Wasserman & Schneider (Phillip Yale Simmons and *Jerry P. Wiskin)* for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Karen P. Binder,* U.S. Customs Service, of counsel; for defendant

Opinion

Musgrave, *Judge:* The Customs Service classified imported liquid crystal used in liquid crystal displays as "chemical mixtures" under item 407.16 TSUS. Plaintiff protested this classification, claiming the liquid crystals are finished commercial parts used exclusively in the manufacture of liquid crystals displays, thus qualifying as parts of "indicator panels or other visual signalling apparatus" under item 685.70 TSUS. *Held*: Plaintiff has overcome the presumption of correctness of the government's classification; liquid crystals are properly classified under item 685.70 TSUS.

Background

Plaintiff E.M. Chemicals (now EM Industries; hereinafter "EM") challenges the tariff classification of liquid crystals imported from England and West Germany during the years 1982 and 1983. All of the merchandise in issue was classified by the U.S. Customs Service as chemical mixtures. EM contests that classification, claiming the liquid crystals are properly classified as "parts of indicator panels or other visual signalling apparatus." Defendant United States has asserted an alternative classification with respect to three of the imported liquid crystals.

The relevant tariff provisions are as follows:

Classified under:

Schedule 4. Chemicals and Related Products.

Part 1, Subpart B.—Industrial Organic Chemicals

* * * * * * *

Mixtures in whole or in part of any of the products provided for in this subpart:

* * * * * * *

407.16	Other	1.7 cents per pound + 13.6% *ad valorem*

Defendant's alternative classifications of CB-15, M-30 and K-15:

Cyclic organic chemical products in any physical form having a benzenoid, quinoid, or modified benzenoid structure, not provided for in subpart A or C of this part:

* * * * * * *

Other:

405.60	Products provided for in the Chemical Appendix to the Tariff Schedules	0.1 cents per pound + 20.5% *ad valorem*
405.62	Other	13.5% *ad valorem*

Plaintiff's claimed classification:

Schedule 6. Metals and Metal Products.

Part 5.—Electrical Machinery and Equipment.

* * * * * * *

685.70	Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus, all the foregoing which are electrical and parts thereof	3.4% *ad valorem*

Insofar as no genuine issue of material fact exists, the parties' cross-motions for summary judgment can be disposed of upon resolution of the issue of law presented: whether nematic liquid crystals, as imported, are classifiable under item 685.70 TSUS as parts of "indicator panels or other visual signalling apparatus," or under item 407.16 TSUS as "other chemical mixtures."

At the time of importation, liquid crystals were used exclusively in the manufacture of various LCD's.[1] Liquid crystals have properties of both fluids and solids, although they also possess properties that are not found in *either* fluids or solids.

[1]This use apparently included some experimental LCD application. Plaintiff's Brief at 27.

The liquid crystals at issue here are nematic, which respond to an electric field by randomly "twisting" along their axes, thereby changing their optical properties. To stabilize this random twisting, thus enhancing the commercial usefulness of nematic liquid crystals, a "twist agent"[2] is added.[3] Nematic liquid crystals are commonly found in watches, calculators, gasoline pumps, paging devices, telephones, toys, and scientific and medical equipment.

The manufacture of commercial liquid crystals begins with the synthesis of individual compounds, described by EM as:

> often involving 10 or more steps * * * the synthesis of individual compounds involves the chemical reaction of precise amounts of the appropriate chemical reagents at elevated temperature under nitrogen pressure, and, then, purification of the compound by vacuum distillation * * * [thus] providing the capability to adjust the chosen physical property over a wide range whilst keeping all other properties essentially constant. Plaintiff's Brief at 7 (citing Allan Declaration, Exhibit C).

This allows EM to produce a commercial product with specific physical properties suitable for use in a particular LCD.

The finished LCD is comprised of a specific amount of liquid crystal sandwiched between two "plates," one of which must be transparent. The other may be transparent or serve as a backing mirror. Each plate has the electronic connections necessary to activate the liquid crystals. The configuration of the electronics depends upon the application of the display. Using polarizers above and below the liquid crystal sandwich, light is passed or blocked, in orchestration with the molecular orientation of the crystals, causing alphanumeric or other characters to be "displayed."

Discussion

A presumption of correctness attaches to a classification by the U.S. Customs Service; to overcome the presumption, the importer must demonstrate the government's classification is incorrect, or persuade the court of the merits of a better classification. 28 USC § 2639(a)(1). *See Stewart-Warner Corp.* v. *United States,* 748 F.2d 663 (Fed. Cir. 1984); *Jarvis Clark* v. *United States,* 733 F.2d (Fed. Cir. 1984); *Schott Optical Glass, Inc.* v. *United States,* 11 CIT 899, 678 F. Supp. 882 (1987). The government argues their classification of the liquid crystals as chemical mixtures should be upheld, with the exception of crystals CB–15, K–1 and M–30, these being properly classified under the claimed alternatives of items 405.60 and 405.62 TSUS. EM asserts the liquid crystals are not utilized for any of their chemical properties, thus necessitating their removal from the chemical schedule, nor are they a mere mixture of chemicals. The liquid crystals represent finished commercial products that have

[2]One of the liquid crystals at issue, specifically "CB-15," is in itself a twist agent.

[3]This addition normally occurs after importation, but if done before, the imported liquid crystals are characterized as "predoped."

undergone substantial processing to prepare them for use in LCD's, and have *no* other use *but* as parts of LCD's. Therefore, since LCD's are analogous to indicator panels, EM maintains the liquid crystals should be classified as parts of indicator panels or other visual signalling apparatus.

The Court finds EM's argument persuasive, and holds that the importer EM has overcome the presumption of correctness of the government's classification (excepting, of course, the three crystals which the government initially misclassified, to which no presumption of correctness attaches). The better classification for the nematic liquid crystals at issue is under item 685.70 TSUS, and the government's alternative classifications are rejected.

The government's claim that *Tomeogawa USA, Inc.* v. *United States,* 12 CIT ——, 681 F. Supp. 867 (1988), mandates classification of liquid crystals under Schedule 4 is unconvincing. Because certain photographic chemicals—utilized for their electrostatic, rather than chemical, properties—were classified under Schedule 4 in *Tomeogawa,* the government argues that so too must liquid crystals—utilized for their physical, rather than chemical, properties—fall under the chemical schedule.

Such an argument ignores the critical fact that in *Tomeogawa,* the importer tried to equate the merchandise with an item (ink) specifically provided for in the tariff schedules. The essential ingredient (liquid) for that specific item was missing from the imported merchandise, and the government's classification prevailed. Here, the question is quite different; no specific designation for liquid crystals exists in the Tariff Schedules (as it did for ink), and the court must determine the correct classification as a matter of law. Thus, the utilization of liquid crystals for their physical, rather than their chemical, properties demands their removal from the chemical schedule.

In addition, liquid crystals more closely resemble manufactured commercial products than chemical mixtures. In *Pharmacia Laboratories, Inc.* v. *United States,* 66 Cust. Ct. 202, C.D. 4190 (1971), the court held Sephadex, a synthetic gel formed by a chemical mixture of polysaccharide dextran and epichlorohydrin, to be "made by a number of steps which can be designated as a manufacturing process and that it is, as the end result of such a process, a manufactured commodity," *id.* at 207, and rejected the importer's claim that the merchandise was a chemical mixture. *See also Phillip Bros. Ore Corp.* v. *United States,* 45 Cust. Ct. 64, C.D. 2199 (1960).

Additionally, in *United States* v. *Shell Oil, Inc.,* 44 CCPA 54, C.A.D. 637 (1957), the court rejected the government's claim that "Teepol," a product used principally as a detergent, should be classified as a chemical compound or mixture. Relying on lexicographic definitions of "mixture" and "compound," the court held the import was "not produced by a mere mixing of its ingredients but by an elaborate process * * * and may include different chemical com-

pounds in relatively close association." *id.* at 59. Thus, Teepol was classified as a manufactured item, not specially provided for.

Similarly, liquid crystals are formed by complex chemical processes, rather than a mere mixing. Various chemical compounds form a discrete, identifiable product that can be utilized in differing proportions and combinations to produce an assortment of LCD's, depending on the physical properties required in each display. As such, liquid crystals are not chemical mixtures, but rather a finished commercial product dedicated only to use in LCD's.

The government mistakenly places much reliance on Headnote 3(a) to Schedule 4, defining "mixtures."[4] The government argues that Headnote 3(a) supports its position that the complexity of the manufacturing process has no relevancy under Schedule 4 TSUS. Yet *Shell, Phillips Bros., Pharmacia* and their progeny indicate exactly the opposite; that courts *should* focus on the complexity of the process used to manufacture the finished product.

Furthermore, Headnote 3(a) was included in Schedule 4 only to provide for a more uniform definition of "mixture." *See Tariff Classification Study,* Explanatory Notes (November 15, 1960). It does not mandate classification of an article under Schedule 4 merely because the article can be described as a mixture.

The parties also do not dispute that the only use of liquid crystals during 1981–1984 was in LCD's. Liquid crystals had no commercial use as chemicals. Under General Interpretive Rule 10(c), when an article is described by more than one item, it is to be classified under the provision which describes it most specifically. *See,* e.g., *Aceto Chemical Co.* v. *United States,* 59 CCPA 212, 220–21, 465 F.2d 908, 914 (Fed. Cir. 1972). Liquid crystals are more specifically provided for outside the chemical schedule, under the tariff provision most accurately describing their *use.* Item 685.70 TSUS is a "use" provision, and describes the imported items with more relative specificity than the basket provisions relied upon by the government. "It has been the consistent view of the court that a provision which describes an importation by its use is more specific than one which provides for an importation by a general description." *Conray Products Co.* v. *United States,* 64 Cust. Ct. 582, 584 (1970), citing *Drakenfeld & Co.* v. *United States,* 2 Ct. Cust. Appls. 512, T.D. 32248 (1912). Thus, item 685.70 TSUS more specifically describes the liquid crystals than the chemical provisions advanced by the government.

Before addressing EM's argument that nematic liquid crystals should be considered "parts" for tariff purposes, it must be determined whether LCD's come within the purview of item 685.70

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[4]Schedule 4 headnotes:

* * * * * * *

3. (a) The term "*mixtures*," as used in this schedule, means substances consisting of two or more ingredients (i.e., elements or compounds), whether occurring as such in nature, or whether artifically produced (i.e., brought about by mechanical, physical, or chemical means), which do not bear a fixed ratio to one another and which, however thoroughly commingled, retain their individual properties and are not chemically united. The fact that the ingredients of a product are incapable of separation or have been commingled in definite proportions does not in itself affect the classification of such product as a mixture.

TSUS as "indicator panels or other visual signalling apparatus." The government argues that LCD's belong outside item 685.70 TSUS because only devices which signal or alert the user of abnormal or unusual circumstances belong under this subheading. Relying particularly on *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp. 466 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985), the government claims LCD's are not specifically devices, the purpose of which is to signal or alert the user of abnormal or temporary conditions. However, NEC deals with the classification of radio pagers which *contained* LCD's (which, in turn, contained liquid crystals); because of their "superior communication capability," 8 CIT at 191, radio pagers were not classifiable under item 685.70 TSUS.

The holding of *NEC America* does not apply to LCD's themselves, which can be incorporated not only in radio pagers, but also in watches, clocks, meters, calculators and a host of other products, as previously noted. *Supra* at 3. The government has fallen into the proverbial trap of comparing apples with oranges; the classification of the ultimate product into which the LCD's are incorporated is not at issue here, nor is the rationale of *NEC America* directly relevant. *See also BASF Wyandotte Corp.* v. *United States,* 855 F.2d 852 (Fed. Cir. 1988).

Other cases cited by the government to illuminate the scope of item 685.70 TSUS involve the classifications of items, none of which are analogous to LCD's. *Carling Electric Co.* v. *United States,* 7 CIT 303, *aff'd,* 757 F.2d 1285 (1985) (indicator lights); *Oxford Int'l Corp.* v. *United States,* 75 Cust. Ct. 58, C.D. 4608 (1975) (taillights); *Amersham Corp.* v. *United States,* 5 CIT 49, 564 F. Supp. 813 (1983) (foil disks), and *A & A Int'l, Inc.* v. *United States,* 5 CIT 183 (1983) (metal detectors).

The court finds *Intercontinental Air Freight, Inc.* v. *United States,* 62 Cust. Ct. 214, C.D. 3731 (1969), and *Texas Instruments, Inc.* v. *United States,* 82 Cust. Ct. 287, C.D. 4811 (1979), *aff'd,* 67 CCPA 59, C.A.D. 1244, 620 F.2d 269 (1980), to be dispositive. In *Intercontinental,* the disputed merchandise consisted of 12, flat, parallel plastic strips, each one etched with a particular number, decimal point or comma, and each connected to an individual light bulb which, when activated, sent light through the strip to be refracted at the point of the etched symbol. The end result was a digital display, with each strip constituting an indicator, and, when attached together, forming an indicator panel. Adopting the importer's claimed classification under item 685.70 TSUS, the court ruled that the visual transmission of information through the illumination of specific numbers equalled a "signal" within the scope of the claimed classification, *id.* at 217. Thus, the imported indicator was held to be a visual signalling apparatus, *id.* at 218.

LCD's can be described as performing the same function as the indicators above. They convey information in digital or other alphanumeric form, enabling the user to view images formed by the con-

figuration of liquid crystals sandwiched between two plates. Although light bulbs are not required for LCD's to transmit this information, electrical currents are still necessary to activate the make-up of nematic liquid crystals for display purposes (just as light bulbs depend on electricity).

Futhermore, although this court may refer to lexicographic definitions in ascertaining the meaning of items in TSUS, they are of little assistance when struggling with the amorphous term "indicator panel." The rapidly expanding technology of LCD design also limits the usefulness of dictionary definitions.

Likewise, the legislative history[5] of the relevant provisions is unavailing.

In *Texas Instruments,* 82 Cust. Ct. 287, the court held the government's classification of light emitting diodes (LED's) found in watch dials under item 720.40 TSUS ("watch movements") incorrect, and classified the LED's according to the stipulation of the parties as "indicator panels" under item 685.70 TSUS.

The holding of *Texas Instruments* controls here. Even though the parties stipulated that plaintiff importer would prevail under the claimed classification should the government's classification prove incorrect, the court decided the case "in light of the evidence adduced *in this proceeding." Id.* at 290 (emphasis added). The opinion also states: "[f]rom the *entire record in this proceeding,* the court is satisfied that the merchandise is properly classified, as claimed by plaintiff, as an indicator panel or a visual signalling apparatus." *Id.* at 293 (emphasis added). Therefore, the fact that the court's ruling was compelled by the stipulation between the parties does not detract from the force of that holding. The classification of LED's under item 685.70 TSUS resulted from the court's examination of *all* the evidence.

Part of that evidence relied upon by the *Texas Instruments* court was a series of Customs Ruling letters addressing the proper classification of LED's and LCD's, dated December 29, 1974. *Id.* at 293, fn. 5. "The Customs Service has classified * * * liquid crystal [displays] incorporated in numerous other appliances and articles, other than watches and clocks, as indicator panels or other visual signalling apparatus under item 685.70, TSUS." *Id.*

Because LCD's perform virtually the same function as LED's (the main difference being that LED's are self-illuminating, while LCD's are not), *Texas Instruments* mandates a finding by this court that LCD's come within the ambit of item 685.70 TSUS.

Two other factors bear on this Court's decision. First, courts have found past interpretations of item 685.70 too restrictive. *See A & A Int'l, Inc.* v. *United States,* 5 CIT 183 (1983), *Fedtro, Inc.* v. *United States,* 449 F.2d 1395, 59 CCPA 16, C.A.D. 1028 (1971). Additionally, the *Summaries of Trade and Tariff Information,* USITC Pub. 841,

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[5] *Tariff Classification Study,* Explanatory Notes (November 15, 1960).

Control 6-5-23 (July 1982)[6] specify LCD's as a "major" example of indicator panels. *Id.* Although not dispositive of congressional intent, the *Summaries* are nonetheless instructive. These factors and the decisions in *Intercontinental* and *Texas Instruments* impel this court to reaffirm the expansive readings accorded item 685.70 TSUS. LCD's are indeed "indicator panels or other visual signalling apparatus" within the meaning of item 685.70 TSUS.

Thus, the question remains whether nematic liquid crystals are "parts" of LCD's for tariff classification purposes. The government claims the liquid crystals are "materials" because they are subject to further processing after importation, and their identity is not fixed with certainly at the time of importation, nor are the crystals dedicated to a specific use.

Given the extensive documentation in the record of the process employed to produce liquid crystals, *see* Plaintiff's Brief at 6–7, the government's reliance on cases such as *Heraeus-Amersil, Inc.* v. *United States,* 10 CIT 258, 640 F. Supp. 1331 (1986) and *Lee Enterprises, Inc.* v. *United States,* 84 Cust. Ct. 208, C.D. 4860 (1980) seems misplaced. These cases support EM's contention that the liquid crystals are "parts" of LCD's.

In *Heraeus,* the court held that rolled precious metal contact tape was so far advanced in manufacture as to be dedicated solely for use as contacts for electrical relays and was thus classifiable as parts under item 685.90 TSUS. In arguing that the tape was "materiel" instead, the government made much of the "significant processing," *id.* at 261, the tape underwent *after* importation, and that the tape had more than one use. The court rejected both of these arguments, holding that the tape was sufficiently advanced in the manufacturing process at the time of importation to be identifiable as parts, and that further cutting, positioning and welding of the tape after importation did not characterize the tape as "material" subject to further manufacturing.

Additionally, in *Heraeus,* the tape, which was manufactured to particular specifications, had no other substantial commercial use than as contacts in certain telephone relays, *id.* at 262. "The absence of any evidence of alternate uses may be considered by the court in determining whether the merchandise is dedicated exclusively to its ultimate use," *id.* at 262. *See also United States* v. *Nylonge Corp.*, 48 CCPA 55, 62–63, C.A.D. 764 (1960).

In *Lee,* 84 Cust. Ct. 208, aluminum photopolymer plates used in printing presses were held properly classifiable under item 668.50 TSUS ("other parts of printing machinery"). The plates were designed for use in rotary letterpresses; this machinery could not function for the purposes for which it was designed without the use of the printing plates. *Id.* at 215. Since the identity of the individual plates was fixed with certainty at the time of importation, *id.* at

[6]The *Summaries of Trade and Tariff Information* reflect existing administrative practice. *Hawaiian Motor Co.* v. *United States,* 67 CCPA 42 (1981).

213, and the plates were "too far advanced toward the ultimate product to be considered as mere material," *id.* at 215, the court concluded these plates were parts of printing machinery.[7]

Liquid crystals in this case meet the requirements of *Heraeus* and *Lee*; they were dedicated exclusively for use in one product at the time of importation[8] and their character was fixed with certainty due to the advanced manufactured state of the crystals at the time of importation. It is undisputed that during the time of importation, liquid crystals had one sole commercial application in the United States. Plaintiff's Brief at 27–28. They were dedicated exclusively for use in LCD's, which could not function without the presence of liquid crystals. Plaintiff's Brief at 24–25.

In addition, liquid crystals can be utilized in various size LCD's. The size of the display to which the liquid crystals are ultimately dedicated may not be known at the time of importation. Once ascertained, the proportions and amounts (as well as the type of twist agent required, if the crystals are not "predoped") necessary to attain that size and maintain the required physical properties can easily be assembled. As in *Lee,* the lack of dedication at the time of import to any particular size LCD does not remove the liquid crystals from the range of articles under item 685.70 TSUS.

Finally, because the quantity of nematic liquid crystals used to make LCD's varies according to the size of the display does not mean the character of the liquid crystal is not fixed with certainty at the time of importation. EM imports these crystals in bottles of 5, 10, 20, 50 or 100 grams. LCD manufacturers then order the quantity required to produce a specific number of displays. The crystals are removed from the bottles and applied to the particular size display for which they were ordered. Plaintiff's Brief at 20–22. This application may require the addition of a twist agent, but hardly resembles further manufacturing. The evidence presented by EM reflects a process more akin to an assembly operation, which those in the industry regard as simply "hand-mixing." *Plaintiff's Brief,* at p. 30. The character of the nematic liquid crystals is fixed with certainty at the time of importation due to their advanced manufactured state.

Certain of the items at issue, specifically, thermochromic liquid crystals TM 74A, TM 74B, TM 75A and TM 75B, do not fit the analysis set forth above; however, plaintiff EM has abandoned all claims with respect to these enumerated items.

Conclusion

The plaintiff E.M. Chemicals has offered a better classification for imported nematic liquid crystals than that found by the Customs Service, thereby overcoming the presumption of correctness that at-

[7]The court reached this conclusion despite the fact that the imported articles were not dedicated to any particular size printing plates. *Lee* at 214.

[8]Even if the liquid crystals had other uses, but were *chiefly* used in LCD's, then under General Interpretive Rule 10(ij), the requirement of *Heraeus* would still be met. *See supra* at 8.

taches to the government's determination. The alternative classifications proposed by the government are rejected as well. Nematic liquid crystals are parts of indicator panels or other visual signalling apparatus, and are properly classifiable under item 685.70 TSUS, except for the thermochromic liquid crystals enumerated above.

(Slip Op. 89–147)

THE ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET. AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS AND FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, DEFENDANT-INTERVENOR

Consolidated Court No. 87–04–00622

[Plaintiffs' motion for 19 U.S.C. § 1516a(c) injunction granted.]

(Dated October 19, 1989)

Arnold & Porter (Patrick F.J. Macrory, Spencer S. Griffith and *Gwyn F. Murray)* for Asociacion Colombiana de Exportadores de Flores, et. al.

Heron, Burchette, Ruckert & Rothwell (Thomas A. Rothwell, Jr. and *James M. Lyons)* for Floramerica.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Jeanne E. Davidson*) Civil Division, United States Department of Justice; *Anne W. White,* Office of the Chief Counsel for Import Administration, United States Department of Commerce for defendant.

Stewart & Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., and *Jimmie V. Reyna)* for Floral Trade Council of Davis, California.

OPINION

RESTANI, *Judge:* Plaintiffs seek an injunction pursuant to 19 U.S.C. § 1516a(c)(e) (1982) preventing liquidation according to the agency's original determination and, thus, liquidation in accordance with the court's decision of all entries which might have been, but were not, covered by the International Trade Administration's (ITA's) first annual administrative review. The court has granted such injunctive relief in certain cases, notably *Oki Elec. Indus. Co.* v. *United States,* 13 CIT ——, 669 F. Supp. 480 (1989); *Ipsco, Inc.* v. *United States,* 12 CIT ——, 692 F. Supp. 1368 (1988); and *Sonco Steel Tube Div.* v. *United States,* 12 CIT ——, 698 F. Supp. 927 (1988). On the other hand, such injunctive relief has been denied in similar situations. *See eg. Cambridge Lee Industries, Inc.* v. *United States,* Slip Op. 89–145 (Oct. 18, 1989); *NTN Bearing Corp.* v. *United States,* 12 CIT ——, 701 F. Supp. 226 (1988); *appeal dismissed as moot,* No. 89–1121 (Fed. Cir. May 10, 1989); *Fundicao Tupy S.A.* v.

United States, 11 CIT ——, 669 F. Supp. 437 (1987), *appeal dismissed as moot*, 841 F.2d 1101 (Fed. Cir. 1988).[1]

The court will not attempt to harmonize these cases today as they appear to represent a conflict over the meaning of several interlocking provisions of a comprehensive statutory scheme which the court is charged to interpret. On the other hand, more sophisticated arguments are being presented to the court while others are being abandoned with regard to the various statutes involved, so that some degree of harmony may eventually arise.[2] As far as the court can determine there is a degree of harmony in the court's opinions in that none have treated the issue directly as one involving jurisdiction. Nonetheless, defendant continues to treat this as a jurisdictional issue. The court adheres to its previously expressed views. The court has jurisdiction over the parties and the subject matter. The statute by its plain language allows the court to issue injunctions in cases involving, *inter alia*, reviews of final affirmative determinations. 19 U.S.C. § 1516a(a)(2)(B)(i) and § 1516a(c)(2) (1982 & Supp. V 1987).

The case of *British Steel Corp.* v. *United States*, 10 CIT 661, 647 F. Supp. 928 (1986), *appeal dismissed as moot*, No. 87-1050 (Fed. Cir. Apr. 1, 1987), cited by defendants is distinguishable and adds nothing to defendants' arguments on jurisdiction. The court's comments regarding the scope of the original determination before the court in that case were made in the context of an added challenge to a refusal of ITA to commence an administrative review. To the extent that that case involved denial of an injunction to effectuate the court's decision, the case did not appear to turn on jurisdiction. Furthermore, the lack of discussion of the meaning of the crucial statute, 19 U.S.C. § 1516a(c), makes the case of little instructive value with regard to this action.

Defendants appear to argue that in *Ipsco* the court misconstrued legislative history. *See* 692 F. Supp. at 1372. Defendants make too much of the language in *Ipsco* indicating that it is possible in some cases for parties to forego annual administrative reviews entirely and to limit their challenge to ITA action to judicial review of final original orders. This is a possibility, but it does not alter the fact that the court cannot review administrative action until there is such action. In this case the agency acted. It issued a reviewable final administrative decision which was judicially reviewed and found wanting in part. *See Asociacion Colombiana De Exportadores De Flores* v. *United States, et al.*, 13 CIT ——, 704 F. Supp. 1114 (1989), and 13 CIT ——, 717 F. Supp. 848 (1989), *appeal pending* No. 89-1742 (Fed. Cir. Sept. 27, 1989). The issue now before the court is

[1]Defendant-intervenor is incorrect in likening this matter to *Fabricas El Carmen, S.A., De C.V.* v. *United States*, 12 CIT ——, 680 F. Supp. 1577 (1988) and *Agrexco Agricultural Export Co., Ltd. et al.* v. *United States*, Slip Op. 88-052 (May 4, 1988) as the motions at issue in those cases involved attempts to direct actions in ongoing administrative reviews not before the court.

[2]There is no indication, however, that the certainty needed by litigants will be achieved without an appellate court decision on this issue. *See Cambridge Lee, supra*, at 5.

what effect to give the court's determination. The court has jurisdiction to decide that issue.[3]

The statute provides only one clear avenue for obtaining liquidation of past entries in accordance with the court's determination. That avenue is through injunction of liquidation under 19 U.S.C. § 1516a(c). In this case injunction of liquidation has been obtained at the behest of the domestic industry. Unlike the plaintiff in *British Steel*, Floral Trade Council (FTC), which represents various U.S. flower growers, filed a new action challenging ITA's refusal to institute a review of its order as to the entries of certain exporters and producers for the first annual period. This court upheld ITA's determination to conduct a limited review and that case is now on appeal. *Floral Trade Counsel of Davis, Calif.* v. *United States*, 13 CIT ——, 707 F. Supp. 1343 (1989), *appeal pending*, No. 89–1425 (Fed. Cir. Apr. 26, 1989). The injunction issued in that case pending appeal, however, is not an injunction under 19 U.S.C. § 1516a(c) that will compel liquidation of the entries subject to injunction in accordance with the court's decision. Hence it is not premature to consider plaintiffs' request.[4]

In terms of the standard four-part test for injunctive relief, some requirements are clearly met while others present debatable issues. *See Matsushita Elect. Indus. Co.* v. *United States*, 823 F.2d 505, 509 (Fed. Cir. 1987) (In order for a preliminary injunction to issue plaintiff must show (1) likelihood of success on the merits; (2) the balance of hardship is in favor of plaintiff; (3) the public interest will be served by the relief requested; and (4) immediate and irreparable injury.); *S.J. Stile Assoc.* v. *United States*, 68 CCPA 27, 30, 646 F.2d 522, 525 (1981); *American Air Parcel Forwarding Co.* v. *United States*, 1 CIT 293, 297, 515 F. Supp. 47, 52 (1981).

This appears to be a case in which success on the merits, in terms of plaintiffs' challenge to the original determination, is not an issue. The court has issued a final judgment sustaining an ITA remand determination reflecting lower duty rates than originally ordered. Although plaintiffs did not upset the entire antidumping order, their litigation did succeed in part and they wish effectuation of the results of the litigation to a greater degree than merely future alteration of deposit rates, which may never occur.[5]

The balance of hardships tips toward plaintiffs. An injunction at this point would cause no disturbance of the *status quo* in terms of derailing ongoing administrative processes. No entries are being liq-

[3]Although the substance of the action has been disposed of through a final judgment, the court reserved jurisdiction over the issue now before the court. *See* Judgment entered herein August 7, 1989.

[4]Defendants indicate that success by FTC in obtaining an administrative review will moot the instant motion because liquidation would then be in accordance with the rates established by the administrative review. That is true as far as the entries which are the subject of appeal are concerned. It is very unclear to the court as to whether all non-reviewed entries are at issue in the appellate case. In any case, until reversal occurs this motion is not moot but, rather, presents a live controversy. Many disputes may be mooted by future events. Such a fact does not compel the court to cease consideration of claims. The court chooses to proceed now to avoid being faced with emergency motions if the court's decision is upheld on appeal and the stay pending appeal is dissolved.

[5]The court sees some potential for the type of mootness or lack of effective judicial review discussed in *Zenith Radio Corp.* v. *United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). *See also Ipsco*, 692 F. Supp. at 1374–75.

uidated. Disruption of ongoing agency operations was of concern to the court in *Algoma Steel Corp.* v. *United States,* 12 CIT ——, 696 F. Supp. 656 (1988) (partial stay pending appeal of ITC determination). Liquidation in accordance with the court's determination will only cause payment of such duties as the court has found to be lawful. This hardly can be labeled a burden on defendants. FTC may bemoan its inability to obtain a full administrative review for the first annual period because of this court's *Floral Trade* decision cited previously, but no legally cognizable hardship is involved. Whether FTC might have obtained a better result had it requested a full review in time is simple speculation. Furthermore, any such speculative harm should not be weighed against plaintiffs as FTC's failure to obtain the review it desired is not attributable to plaintiffs' behavior but, rather, to FTC's own actions. *See Floral Trade,* 707 F. Supp. 1343.[6] Plaintiffs, as indicated, want to avoid payment of millions of dollars in duties which the court has determined are not owing. The balance tips in favor of plaintiffs on this point.

The public interest is a bit difficult to analyze here, except that a result which aids the goals of the statute may be said to be in the public interest. The court is not convinced that it should abandon the *Oki-Ipsco-Sonco, supra,* lines of cases which hold that the fullest appropriate effectuation of judicially determined results and avoidance of baseless requests for administrative review is the result preferred by the statutory scheme.

The court is concerned, however, that injunction may not be appropriate in this case because of plaintiffs' change in position, which is relevant to the irreparable harm factor. While the court believes plaintiffs cannot simply change positions on whether injunctive relief should be granted depending on how they see the judicial winds blowing, they do have an independent reason for their change of position here. At first plaintiffs sought immediate liquidation in order to regularize their accounts. Upon FTC's successful motion for injunction of liquidation plaintiffs could not promptly normalize their financial arrangements and reports, *e.g.,* by releasing contingent liability funds, and they now seek the effectuation of the court's opinion. This, in and of itself, does not bar plaintiffs' latest request. It does, however, make a point raised by defendants. Perhaps plaintiffs can change positions so easily because they would not be irreparably harmed by any failure to order liquidation in accordance with the ITA determination approved by the final decison of the court.

The court believes that it is appropriate to apply a sliding scale to this analysis. *See National Customs Brokers and Forwarders Assn. of America* v. *United States,* Slip Op. 89–140 at 13 (CIT, October 10, 1989); *Algoma Steel Corp., Ltd.* v. *United States,* 12 CIT ——, 696 F. Supp. 656, 658 n.2 (1988); *The Timken Co.* v. *United States,* 11 CIT

[6]It is grasping at straws for FTC now to argue that it should be able to renew its request for administrative review if this injunction is granted. The range of possible outcomes were apparent when FTC had the opportunity to request a first administrative review.

506–07, 666 F. Supp. 1558, 1559–60 (1987) ("In a flexible balancing approach, the showing of ultimate success is inversely proportional to the severity of the injury.") Perhaps at the outset a showing of irreparable harm sufficient to order injunctive relief could not have been made, but plaintiffs have now won the day, at least in some significant part. Furthermore, injunction of liquidation exists; continuing the injunction to effectuate the court's decision disrupts no ongoing administrative operations. It does, however, avoid needless adherence to errors and irrecoverable loss to plaintiffs. Thus, the court sees at least three factors for injunctive relief strongly in plaintiffs' favor, and one factor at least arguably in their favor.

As discussed in the *Oki-Ipsco-Sonco* line of cases, Congress never envisioned the situations existing in those cases, let alone this peculiar set of circumstances. In this unusual situation the court finds ITA's view of the law unreasonable in its application. Even ITA admits certain errors in its original determination. The court sees no reason to perpetuate such errors where all administrative action has already been halted.

The scope of the injunction, however, is also of concern to defendants. Related thereto is defendant-intervenor Floral Trade Council's claim that plaintiff Asociacion Colombiana de Exportadores de Flores (Asocolflores) has no statutory standing to seek injunctive relief.[7]

Standing to bring suit is controlled by 19 U.S.C. § 1516a(a)(2)(A) (1982), which provides in relevant part that "an interested party who is a party to the proceeding in connection with which the matter arises" may bring suit to challenge the agency determination. Interested party under 19 U.S.C. § 1677(9)(A) (1982) includes "a foreign manufacturer, producer, or exporter, * * * of merchandise which is the subject of an investigation." Because the statute does not mention producer/exporter trade associations, while it does mention importer trade associations, it has been held that a producer/exporter trade association must be composed entirely of members producing or exporting the relevant merchandise in order to have standing. *See RSI (India) Pvt., Ltd.* v. *United States,* 12 CIT ——, 678 F. Supp. 304, 306–07 (1988); *American Grape Growers* v. *United States,* 9 CIT 103, 105–06, 604 F. Supp. 1245, 1249 (1985).[8]

Floral Trade Council alleges that a few Asocolflores' members export only roses, which is an uninvestigated product. *See* Public Record Doc. 28.[9] The court is not entirely sure what is signified by Doc. 28. Furthermore, if this were a problem and the matter had been

[7]Although a challenge to standing may be made at anytime, the timing here causes the court to be somewhat skeptical. Defendant, United States, does not raise the standing issue.

[8]In demonstrating standing on other than a statutory basis, an association may rely on the harm done to some of its members by the challenged act. The harm need not extend to every member. *National Customs Brokers and Forwarders Assn. of America* v. *United States,* 13 CIT ——, Slip Op. 89–140 at 10–11 (October 10, 1989). *See also Hunt* v. *Washington State Apple Advertising Comm'n.,* 432 U.S. 333, 342–44 (1977); *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975).

[9]It seems irrelevant to this discussion that some of Asocolflores' members produce investigated flowers which were not the subject of the final dumping order. No matter the outcome, such flowers were investigated in the administrative proceedings. This is the thrust of the relevant statutes.

timely raised, could not Asocolflores have reorganized its membership or the composition of the plaintiff group to meet the statute? The court declines to rule at this point, based on less than full briefing and on one isolated document, that Asocolflores should be dismissed as a plaintiff herein because of lack of standing, particularly because it appears unnecessary to resolve this issue to decide the pending motion. Furthermore, the suit as a whole is not in jeopardy because individual exporters and importers and an association of importers have also joined as plaintiffs. Their standing does not appear in dispute.

It appears to the court that any affected importing interest may seek injunctive relief if it will suffer the direct financial harm sought to be prevented by the relief sought. It is the importers who pay the duties assessed. The litigation in this case involved the rates of several individual growers or exporters, as well as the "all other rate." It seems beyond belief that the importing interests represented here are all unaffected by the rate changes at issue, particularly because the "all other rate" is involved. In fact, Floral Trade does not allege that this is the case.

After consulting with the parties, it has become apparent that any injunctive relief should be drawn in terms of the exporters or producers of concern to the plaintiff importing interests. ITA's investigations are geared to producers and exporters, not to importers. Customs' administrative handling of Commerce's orders also seems to operate in this fashion. Accordingly, the injunction issued here will apply to those producers or exporters (and entries related thereto) which could have been, but were not, the subject of the first annual review; which have been found to have rates different from those specified in the pre-remand final determination; and whose goods subject to the antidumping order were exported during the relevant period to any of the importers represented here or to any of the members of the importer trade association represented here.[10]

Plaintiffs shall provide defendant with a list of such exporters/producers accompanied by an affidavit of counsel that such list has been compiled in accordance with the court's direction. Entries from such listed exporters and producers for the period November 3, 1986 through Febraury 29, 1988 shall not be liquidated in accordance with the pre-remand determination reviewed here, but shall be liquidated as provided in 19 U.S.C. § 1516a(e). This injunction is effective only upon the latter of 10 days after (1) receipt of the list by ITA and (2) affirmance of the judgment in the related litigation as to scope of the first annual review and dissolution of the injunction pending appeal issued therein.

[10] There has been insufficient demonstration that purely exporting interests, as plaintiffs herein, are entitled to have injunctive relief drawn without reference to the injured party importing interests. The relationship of the exporters/producers to the harm which would be suffered has not been demonstrated sufficiently.

(Slip Op. 89-148)

EASTALCO ALUMINUM CO., PLAINTIFF v. UNITED STATES, DEFENDANT

Consolidated Court No. 83-01-00095

[Judgment for defendant.]

(Dated October 19, 1989)

Neville, Peterson & Williams (*John M. Peterson*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office (*Kenneth N. Wolf*), Civil Division, United States Department of Justice and *Edward N. Maurer*, United States Customs Service, for defendant.

OPINION

RESTANI, *Judge:* This action concerns classification of certain side and bottom carbon blocks used to line a Hall-Heroult aluminum reduction cell in which aluminum is produced through an electrolytic process. The United States Customs Service classified the blocks as electrodes under item 517.61, Tariff Schedules of the United States (1981) (TSUS). In *Eastalco Aluminum Company* v. *United States,* 10 CIT 622 (1986) the court ruled that the blocks were not electrodes essentially because the side blocks are not intended to be used as electrodes and because both the bottom blocks and side blocks have a vital use as heat insulators and refractories which extends for their entire lives. As to the bottom blocks the court found that such heat insulating and refractory function was longer lasting than the electrode function and was no less essential. Therefore, classification as simply "electrodes" was found to be incorrect under either a chief use or an *eo nomine* analysis.

The court then remanded the matter to Customs. Although it spent some time disagreeing with the court's decision, based on facts not before the court, Customs did address the issues remanded to it. First, whether the electrical conductivity and resistivity of the bottom block made it something other than refractory brick, item 531.27, TSUS, plaintiff's claimed classification.[1] Second, whether the bottom and side blocks are "ceramic articles." Among other requirements, which are not in dispute, ceramic articles must be "substantially crystalline." *See* Headnotes 2 & 2(a) of Schedule 5, Part 2, TSUS. These headnotes apply to the TSUS item covering refractory brick. Customs concluded that pursuant to the court's opinion the merchandise should be classified under item 517.91, a general provision covering carbon and graphite articles.

Following the post-remand continuation of trial, the court came to the conclusion that the evidence (basically the testimony of two equally qualified and believable experts) was in equipoise on the is-

[1]This issue need not be resolved finally because of the court's finding on the second issue, although the court was of the opinion after hearing further evidence that the electrical properties, by themselves, did not make the refractory brick designation inappropriate.

sue of whether the block is substantially crystalline.[2] Plaintiff's expert witness had testified to the effect that the block was more than 50 percent crystalline. Defendant's expert witness had indicated that it was less than 50 percent crystalline. The testimony revealed, however, that quantitative testing could be done to establish a specific degree of crystallinity. A test protocol was then agreed to by the parties. It is now complete and a report has been submitted.

At the risk of oversimplication, the court believes the quantitative test reveals that the block has substantially less than fifty percent crystalline content. Newly submitted testimony of the two experts who previously testified indicates that they have not changed their conclusions in the light of the report. Plaintiff's witness, however, now presents testimony indicating, among other things, that the fifty percent standard is not an appropriate gauge of substantial crystallinity, as that term is used in the tariff schedules, the quantitative test has shown that a very low level of crystallinity. Plaintiff makes the legal argument that the tariff schedules do not denote such a standard.

While fifty percent may not be the appropriate dividing line on this issue of what constitutes substantial crystallinity, as that term is used in the tariff schedules, the quantitative test has shown that a very low level of crystallinity is involved and that plaintiff's witness' earlier evaluation was not as accurate as that of defendant's expert. This has broken the balance. Defendant's witness' opinion that the block has a low percentage of crystalline content and is thus not substantially crystalline has been supported by quantitative testing performed on an agreed basis and the court now finds such testimony to be the more credible.

Accordingly, the court finds that the block cannot be classified as refractory brick because it does not meet the TSUS definition of "ceramic article."

For these reasons and the reasons expressed in the earlier opinion herein the court finds that the subject goods must be classified under item 517.91 as articles of carbon or graphite, a general category, but the only category which can be said to apply to this merchandise based on the evidence presented to the court.

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[2]Perhaps, even in the absence of a presumption of correctness, the court might have ruled for defendant at this point based on failure of plaintiff to meet its burden of proof. Given the continuing nature of the importing process and the fact that this is a test case, the court deemed it more appropriate to attempt to resolve the matter on the basis of other probative evidence that appeared to be available. The additional evidence has not been provided, as the text indicates.

ABSTRACTED CLASSIF

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and ra
C89/197	Watson, J. October 5, 1989	Endicott Johnson Corp.	87-2-00364	Item 700.95 12.5%
C89/198	Watson, J. October 5, 1989	J.C. Penney Purchasing Corp.	87-1-00026	Item 379.95 19¢ per lb. +27.5%
C89/199	Restani, J. October 11, 1989	D&B Roofing Systems	86-8-000986	Item 355.25 Various rates
C89/200	Restani, J. October 11, 1989	D&B Roofing Systems	87-1-00073	Item 355.25 Various rates
C89/201	Restani, J. October 11, 1989	D&B Roofing Systems	87-2-00275	Item 355.25 Various rates
C89/202	Restani, J. October 11, 1989	D&B Roofing Systems	88-7-00572	Item 355.25 Various rates

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	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
ate	Item No. and rate		
	Item 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	New York Footwear
	Item 376.56 12.1%	Izod Outerwear v. U.S., 9 CIT 309 (1985)	New York Garments designed for rainwear, etc.
	Item 359.60 Various rates	Bowe Co. v. U.S., Ct. No. 83-11-01590 (July 13, 1988)	Houston Asphalt roofing product
	Item 359.60 Various rates	Bowe Co. v. U.S., Ct. No. 83-11-01590 (July 13, 1988)	Seattle Asphalt roofing product
	Item 359.60 Various rates	Bowe Co. v. U.S., Ct. No. 83-11-01590 (July 13, 1988)	New York Asphalt roofing product
	Item 359.60 Various rates	Bowe Co. v. U.S., Ct. No. 83-10-01590 (July 13, 1988)	Los Angeles Asphalt roofing product

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